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7 United States of America

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10 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

11 GRANITE STATE INSURANCE ) Case No. 07cv2128 BEN(NLS)  
12 COMPANY, )  
13 Plaintiff, )  
14 v. ) **ANSWER TO COMPLAINT**  
15 UNITED STATES OF AMERICA, )  
16 Defendant. )  
17 \_\_\_\_\_ )

18 COMES NOW Defendant, the United States of America, by and  
19 through its attorneys, Karen P. Hewitt, United States Attorney and  
20 Melanie A. Andrews, Special Assistant United States Attorney, and  
21 for its Answer to Plaintiff's Complaint sets forth the following:

22 1. Answering Paragraph 1 of the Complaint, Defendant states  
23 that the allegations concerning jurisdiction contained therein are  
24 legal conclusions solely within the purview of the court and for  
25 its determination, and no answer is therefore required. To the  
26 extent an answer is required, said allegations are denied.

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1           2.     Answering Paragraph 2 of the complaint, Defendant states  
2 that the allegations contained therein are legal conclusions solely  
3 within the purview of the court and for its determination, and no  
4 answer is therefore required. To the extent an answer is required,  
5 said allegations are denied.

6           3.     Answering Paragraph 3 of the complaint, Defendant states  
7 that it is without knowledge or information sufficient to form a  
8 belief as to the truth of the allegations therein contained, and  
9 based thereon, denies generally and specifically each, all and  
10 every allegation contained therein.

11          4.     Answering Paragraph 4 of the complaint, Defendant states  
12 that the allegations contained therein are legal conclusions solely  
13 within the purview of the court and for its determination, and no  
14 answer is therefore required. To the extent an answer is required,  
15 said allegations are denied.

16          5.     Answering the first sentence of Paragraph 5 of the  
17 complaint, the Defendant admits that Marl Lemoge sustained injuries  
18 on or about April 17, 2004. Answering the second sentence in  
19 Paragraph 5 of the complaint, the Defendant admits that on or about  
20 April 13, 2006, Plaintiff submitted an administrative claim to the  
21 Department of the Navy. Answering the third sentence of Paragraph  
22 5 of the complaint, Defendant admits the substantial truth of the  
23 allegations contained therein. Except as specifically admitted,  
24 Defendant denies, generally and specifically, each, all and every  
25 remaining allegation in said paragraph.

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1           6.     Answering the first sentence of Paragraph 6 of the  
2 complaint, Defendant admits the substantial truth of the  
3 allegations contained therein. Answering the second sentence of  
4 Paragraph 6 of the complaint, Defendant states that the allegation  
5 concerning jurisdiction contained therein are legal conclusions  
6 solely within the purview of the court and for its determination,  
7 and no answer is therefore required. To the extent an answer is  
8 required, said allegations are denied.

9           7.     Answering Paragraph 7 of the complaint, Defendant states  
10 that it is without knowledge or information sufficient to form a  
11 belief as to the truth of the allegations therein contained, and  
12 based thereon, denies generally and specifically each, all and  
13 every allegation contained therein.

14           8.     Answering Paragraph 8 of the complaint, Defendant denies,  
15 generally and specifically, each, all and every allegation  
16 contained therein.

17           9.     Answering Paragraph 9 of the complaint, Defendant denies,  
18 generally and specifically, each, all and every allegation  
19 contained therein.

20           10.    Answering Paragraph 10 of the complaint, Defendant states  
21 that the allegations contained therein are legal conclusions solely  
22 within the purview of the court and for its determination, and no  
23 answer is therefore required. To the extent an answer is required,  
24 said allegations are denied.

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1        11. Answering Paragraph 11 of the complaint, Defendant states  
2 that the allegations contained therein are legal conclusions solely  
3 within the purview of the court and for its determination, and no  
4 answer is therefore required. To the extent an answer is required,  
5 said allegations are denied.

6        Defendant denies all other allegations of Plaintiff's  
7 complaint not specifically admitted.

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9                                    **AFFIRMATIVE AND OTHER DEFENSES**

10        1. The Court lacks jurisdiction over the subject matter of  
11 this action.

12        2. The Complaint fails to state a claim upon which relief  
13 can be granted to the Plaintiff against the Defendant under the  
14 Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80, as  
15 averred in the Complaint or otherwise, for the reason that if said  
16 Defendant were a private person, it would not be liable to  
17 Plaintiff in accordance with the law of the State of California.

18        3. Plaintiff cannot recover for any injury or injuries  
19 caused in whole or in part by and through its' or Mark Lemoge's own  
20 carelessness, negligence, or assumption of the risk.

21        4. To the extent the acts or omissions of others were the  
22 sole proximate causes of any injury, damage, or loss to the  
23 Plaintiff, those acts and omissions have superseded any acts or  
24 omissions of Defendant.

25        5. Plaintiff cannot recover damages from Defendant for any  
26 injuries that were not proximately caused by a negligent or  
27 wrongful act or omission on the part of Defendant or any employee  
28 or agent of Defendant.

1           6.     There was no negligent act or omission on the part of any  
2 federal employee.

3           7.     Defendant asserts, as an affirmative defense, California  
4 Civil Code, § 1431.2(a), which provides:

5           In any action for personal injury, property damage, or  
6 wrongful death, based upon principles of comparative  
7 fault, the liability of each defendant for non-economic  
8 damages shall be several only and shall not be joint.  
9 Each defendant shall be liable only for the amount of  
non-economic damages allocated to that defendant in  
direct proportion to that defendant's percentage of  
fault, and a separate judgment shall be rendered against  
that defendant for that amount.

10          8.     To the extent Plaintiff failed to exercise reasonable  
11 care in mitigating its' or Mark Lemoge's damages, its' or Mark  
12 Lemoge's claims must be barred or diminished.

13          9.     Plaintiff's recovery, if any, is limited to the amount of  
14 the claim the Plaintiff presented administratively. See 28 U.S.C.  
15 § 2675(b).

16          10.    To the extent Plaintiff has alleged speculative future  
17 damages, they do not constitute compensable damages.

18          11.    All future damages, if any, must be reduced to present  
19 value.

20          12.    Income taxes must be deducted from Plaintiff's alleged  
21 past and future lost earnings, if any.

22          13.    In the event Defendant is found liable, which Defendant  
23 expressly denies, Defendant is entitled to an offset against  
24 damages, if any, for all amounts received by Plaintiff from the  
25 United States of America and its agencies, by reason of Plaintiff's  
26 alleged injuries.

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1        14. The recreational use statute bars Plaintiff and Mark  
2 Lemoge from recovering from Defendant for any injury, injuries or  
3 damages suffered by Plaintiff or Mark Lemoge.

4        15. Attorney fees in this action brought under the Federal  
5 Tort Claims Act are limited to twenty-five percent of the amount  
6 awarded, if any, to the Plaintiff.

7        16. If any damages are awarded to Plaintiff, they are to be  
8 apportioned according to the respective fault and legal  
9 responsibility of all parties, persons and entities or the agents  
10 and employees who contributed to and/or caused the incident.

11        WHEREFORE, Defendant prays that Plaintiff take nothing by  
12 reason of its' suit herein, that judgment be rendered in favor of  
13 said Defendant, for costs of suit herein incurred, and for such  
14 other and further relief as this Court may deem proper.

15                DATED: February 04, 2008

KAREN P. HEWITT  
United States Attorney

18                        /s/Melanie A. Andrews  
19                        MELANIE A. ANDREWS  
                              Special Assistant U.S. Attorney

20                        Attorneys for the Defendant  
                              United States of America  
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